STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

v

MARK SLAUGHTER
Defendant-Appellee.

No. 141009

L.C. No. 2007-218038-FH
COA No. 287450

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Was the entry of premises by firefighter personnel here to determine whether, under the circumstances reported by a neighbor with an adjoining wall, there was danger of an electrical fire, reasonable and permissible under the Fourth Amendment as an exercise of government's community caretaking function?

The Court of Appeals answered: NO

Amicus answers: YES

Statement of Facts

Amicus joins the statement of facts given by the People, appellant.

Argument

I.

The entry of premises by firefighter personnel here to determine whether, under the circumstances reported by a neighbor with an adjoining wall, there was danger of an electrical fire, was reasonable and permissible under the Fourth Amendment as an exercise of government's community caretaking function.

A. Introduction

A neighbor of defendant's called 911 because she saw water running down the wall and over the electrical box in the basement of her townhouse. Back upstairs, she heard water running between the wall of her unit and the unit adjoining it. She tried to raise someone in that unit by pounding on the door, but was unsuccessful. She went so far as to contact the management company for the townhouses and was told there was nothing they could do. She knew her neighbor was not home, having seen him leave the adjoining unit about an hour before she called 911.

The Royal Oak Fire Department—which is not a law-enforcement agency—responded to the 911 call concerning the water running down a wall into an electrical panel. The responding fire department lieutenant testified that water running into an electrical box is a fire hazard, that a multi-unit dwelling presents an even greater concern of loss of life and property, and that for that reason a firefighter entered the adjoining unit through a window, unlocked the door, and went down the basement and shut off the water, after an attempt to raise someone in the premises was unsuccessful. While there for that purpose, the firefighter saw marijuana plants and grow lights. An officer from the Royal Oak Police Department was also dispatched to the location, arriving after the firefighters. After the officer was informed of the discovery of the marijuana, a search warrant was obtained and the contraband and other evidence seized under the authority of the warrant.

The fire department lieutenant testified that turning off the water from outside would have shut off water for the entire complex, which is not the practice of the fire department; further, even if the water for the complex had been shut off entry would still have been made to insure that no fire from water on the electrical box had commenced. The Court of Appeals majority held that the prosecution had to show that the entry fell within some exception to the warrant clause of the Fourth Amendment. Describing the entry here as an "administrative search" requiring probable cause and a warrant unless some traditional "exception" to the warrant requirement was met, the majority found that the existing record did not demonstrate the entry was a reasonable one for a "community-caretaking purpose," largely because the majority felt that the firefighters should have taken other measures first, suggesting principally that they should have investigated the unit of the individual who had made the 911 call before investigating the adjoining unit based on her 911 call.

This court in its order granting leave to appeal had directed that the parties address:

- whether the actions of firefighters may fall under the "community caretaker" exception to probable cause requirements;
- whether the "emergency aid" aspect of the community caretaker exception applies in this case; and
- whether the Court of Appeals erred when it held that the firefighters were first obligated to attempt to remedy the condition for which a neighbor called by using means that did not involve entry into the defendant's home.

B. First Principles

When construing a constitutional provision, it is generally wise to return to its text as the starting point, rather than the gloss that has been laid upon it, for as Chief Justice Burger once noted, "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.' "[1]

The 54 words of the Fourth Amendment are contained in two clauses, 1)the "reasonableness" clause, and 2)the "warrant" clause:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

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[1] *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123, 127, 93 S.Ct. 2665, 2668.37 L.Ed.2d 500 (1973), are nowhere more applicable than in this context:

[2] The history of the text of the Fourth Amendment poses something of a historical mystery. The "Committee of Eleven" reviewing proposals for constitutional amendments in the first Congress had reported the proposal out as one clause, not two: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." A proposal to alter first phrase to "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" was adopted, but the motion by Mr. Benson to replace "by warrants issuing" with a comma and "and no warrants shall issue," altering the language and creating two clauses "lost by a considerable majority." 1 Annals of Congr, 1st sess., p. 783. See Lasson, *The Fourth Amendment of the Constitution* (John Hopkins Press: 1937), p. 100-102. Benson, however, was chair of a Committee of Three to arrange the amendments, and when

The controlling theory has long been that the second clause—the warrant clause—predominates, so that all warrantless searches are presumptively unreasonable under the first clause, that presumption being rebuttable however, on a showing that a particular search falls into one of a handful of recognized "exceptions" to the warrant requirement. Some justices have expressed a different view. Justice Black, for example, said " the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only 'unreasonable searches and seizures.' The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances."[3] And Justice Stevens has also said that "The Fourth Amendment contains two separate Clauses, each flatly prohibiting a category of governmental conduct....the ultimate question is whether the category of warrantless searches (in question) is 'unreasonable' within the meaning of the first clause."[4] An influential scholar has reached the same conclusion:

> Justice Frankfurter, and others who have viewed the fourth amendment primarily as a requirement that searches be covered by warrants, have stood the amendment on its head. Such was not the history of the matter, such was not the original understanding."[5]

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presented after so arranged the Fourth Amendment appeared as he had proposed it rather than as the House had passed it. Lasson, at 101. Nonetheless, it was accepted by the Senate in this form, and later formally enacted by Congress, and ratified by the States with its present text.

[3] *Coolidge v. New Hampshire*, 403 U.S. 443, 509-510, 91 S.Ct. 2022, 2059 - 2060 (1971)(Black, J., concurring and dissenting).

[4] Marshall v Barlows, 436 US 307, 56 L Ed 2d 305, 98 S Ct 1816 (1978) (Justice Stevens, dissenting).

[5] Telford Taylor, *Two Studies In Constitutional Interpretation*, p.46-47 (1969).

Such things as inventory searches, administrative inspections, and emergency or "community caretaking" entries which are not premised on enforcement of the criminal law do not fit comfortably within the warrant clause, yet some (administrative searches and inspections) are shoehorned in consistent with the warrant-preference theory of the Fourth Amendment. But a review of the actual text of the Fourth Amendment supplies a way of determining those searches or entries that are within the warrant clause and those which are not. One commentator, arguing that the United States Supreme Court's inspection-warrant cases, where a warrant is required but not ashowing of "traditional" probable cause, are wrongly decided, has set out a textual answer to when the Fourth Amendment requires a search warrant which is faithful both to the text of the Amendment, and to its history.[6]

The answer lies in the language of the warrant clause itself: "no warrant shall issue, but *upon probable cause*, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*" Toward what kinds or types of searches is the warrant clause aimed? Those which have as their principal purpose the *discovery and seizure* of criminal evidence of one sort or another, for in advance of the search probable cause to believe that seizable items will be present on the premises must be shown, and those items must be particularly described in advance to the magistrate. The logical inference drawable from the particularity clause and the probable cause requirement, then, is that a warrant is required for all searches the principal purpose of which is to discover and seize contraband, criminal evidence, or property to which the government has a superior claim to possession, unless necessity (exigent circumstances) justifies

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[6] Bartee, "The Fourth Amendment: An Immodest Proposal," 11 Am J Crim Law 293, 298 (1983).

search without warrant. But searches or entries that have a different purpose—ones where describing in advance and with particularity to a magistrate that which is to be searched for and seized is not possible because the entry has no such object—are simply not within the warrant clause, but must, under the reasonableness clause, nonetheless be reasonable. Shoehorning entries such as administrative inspections into the warrant clause cannot be done without doing violence to its text[7] and its history.[8]

But the "presumption/exceptions" approach continues—at least in name, for it appears that an inquiry as to whether a category or class of warrantless entries into premises is an "exception" to the "warrant preference" because reasonable though warrantless, and an inquiry directly into whether

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[7] As Bartee notes, the administrative search cases engage in the "logical quadruped" in order to fit non-seizure directed searches into the warrant clause, done by redefining probable cause for these entries only:

1. All search warrants require probable cause.
2. An inspection search is not based upon probable cause.
3. For purposes of an inspection search, then, probable cause is to be defined differently than traditionally understood (e.g. a legislative scheme of periodic routine inspection).
4. Therefore an inspection search requires a warrant.

Bartee, at 301. And see Copi, *Introduction to Logic* (MacMillan, 1968), p.172-173. This error is similar to the following syllogism: 1)All presidents of the United States must be natural-born citizens; 2)Henry Kissinger is not a natural-born citizen; 3)for purposes of election a naturalized citizen shall be considered a natural-born citizen; 4)therefore Henry Kissinger can be president. This definitional manipulation results in the logical error of the"logical quadruped."

[8] See Lasson, supra, 13-78; Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (Oxford University Press: 2009), 1-598, concerning the reaction against general warrants as the source of the Fourth Amendment. See also the dissents in *See v Seattle*, 387 US 541, 18 L Ed 2d 943, 948, 87 S Ct 1737 (1967) (Justice Clark, dissenting), and *Camara v Municipal Court*, 387 US 523, 87 S Ct 1727, 18 L Ed 2d 930 (1967), as well the repudiated majority opinion by Justice Frankfurter in *Frank v Maryland,* 359 US 360, 3 L Ed 2d 877, 79 S Ct 804 (1959), observing that regulatory inspections have their antecedents deep in our colonial history, as at the same time that colonists railed against the general warrant, regulatory searches not only were allowed but their use greatly expanded.

a class of warrantless entries into premises is reasonable though warrantless, is much the same inquiry. And the "community caretaking" entry is such a class or category, as recognized only recently by the United States Supreme Court reviewing a Michigan decision:

> "[T]he ultimate touchstone of the Fourth Amendment," we have often said, "is 'reasonableness.' ". . . . Therefore, although "searches and seizures inside a home without a warrant are presumptively unreasonable," . . . that presumption can be overcome. For example, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." *Mincey v. Arizona,* 437 U.S. 385, 393-394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).
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> *Brigham City* identified one such exigency: "the need to assist persons who are seriously injured or threatened with such injury." . . .Thus, law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." . . .This "emergency aid exception" does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. . . .It requires only "an objectively reasonable basis for believing," . . .that "a person within [the house] is in need of immediate aid, ..."[9]

And so, how does this doctrine apply to firefighters who enter with no law-enforcement investigative purpose in mind?

C. The Community Caretaker Function May Be Exercised B y Firefighters

Cases concerning application of the community caretaking doctrine to entries by firefighters are almost non-existent, because virtually all entries of this sort are accomplished by law-enforcement officers.[10] And this is because, outside of the realm of arson investigations, firefighter

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[9] *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009).

[10] See Livingston, "Police, Community Caretaking, and the Fourth Amendment," 1998 U.Chi. Legal F. 261 (1998), discussing the community caretaking function of law enforcement officers (and observing that the warrant preference theory is at best "awkward" for assessing

personnel perform no law-enforcement function. As one court has said, ". . .although fire officials investigate arson, the main function they serve is the protection of persons and property, not the detection of crime. . . ."[11] The principal duty of police officers, on the other hand, is law enforcement, but it is also true that "[i]n the average day, police officers perform a broad range of duties, from typical law enforcement activities—investigating crimes, pursuing suspected felons, issuing traffic citations—to "'community caretaking functions'"—helping stranded motorists, returning lost children to anxious parents, assisting and protecting citizens in need-'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'"[12]

An entry of premises to fight a fire would seem a paradigm of the exercise of the community caretaking responsibilities of governmental officers, and by officers with no law enforcement function in the exercise of their community caretaking duties (as opposed to investigations of the cause of the fire afterward, which may entail an investigative and law enforcement purpose). The United States Supreme Court has said that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is

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community caretaking entries, while an examination for reasonableness, which is highly contextual, affords a better lens for review of those actions; as has been noted, application of a rebuttable warrant preference theory, which justifies some categories of warrantless entries, devolves to a reasonableness inquiry in any event).

[11] *Hunsberger v. Wood,* 570 F.3d 546, 554 (CA 4, 2009).

[12] *People v. Ray.* 981 P.2d 928, 931 (Cal.,1999).

in plain view."[13] But the phrase "exigent circumstances" is commonly used in a different context; that is, where the purpose of the entry is in fact to seize evidence or contraband, and entry without a warrant is permissible because of the "exigency" that the evidence or contraband would be hidden or destroyed in the time taken to obtain a warrant.[14] Using the term both for warrantless entries with a law enforcement purpose and entries with no law enforcement purpose is confusing. Amicus submits that the latter are better referred to as "emergency" circumstances, to distinguish exigent circumstances, and emergency circumstances permit warrantless entries of premises for a community caretaking purpose where under the circumstances the entry is reasonable.[15]

Where the government officers making the entry have no law enforcement function—not even enforcement of an administrative code—the *greatest* latitude should be given to their decisions. Again, while cases setting out the community caretaking doctrine where police officers have entered premises for a non-law enforcement purpose are legion, cases involving firefighters outside the context of actual firefighting and investigation of the cause of a fire are rare. A third circuit case is, however, instructive. In *United States v Moskow*[16] a resident of Philadelphia called the police to say that he heard noises in the vacant building next door. When the police arrived, he told them that there had been a padlock on the door of those premises earlier in the day that was no longer there.

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[13] *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 1950 (1978).

[14] See, for example, *People v. Blasius,* 435 Mich. 573, 575 (1990) (" ... the Court must decide whether the risk of removal or destruction of evidence justified an entry and protective sweep-type search to secure the premises pending issuance of a warrant. We hold that exigent circumstances justified the police entry without a warrant."

[15] See *People v Davis*, 442 Mich 1 (1993); *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). And see Livingston, supra.

[16] *United States v Moskow*, 588 F2d 882 (CA 3, 1978).

The officers also smelled a strong odor of gasoline coming from the premises. They entered, and found a man (Wadley) crouched behind the basement stairs, with three empty gasoline cans and a disposable lighter present. These were seized by the fire marshal. Watley confessed that he was going to burn the building for its owner, Moskow. Moskow moved to suppress the physical evidence.

The Third Circuit upheld the entry and seizure, stating that "to allow this situation to go uninvestigated for the several hours it would have taken to obtain a warrant would have allowed a grave public danger to go uncorrected....Indeed, it can be said it was the duty both of the police and the fire marshal to act promptly to investigate and eliminate the public hazard."[17] Further, said the court, just as the Supreme Court had said in *Tyler* that it would "defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze," so it "would also defy reason for a fire marshal to secure a warrant before entering a structure to prevent a fire by ordering the building ventilated and by seizing three empty gasoline cans and a 'bic' lighter."[18]

So also here, as well argued by the People. Further, the Court of Appeals majority seems to have adopted a "least intrusive means" analysis in its assessment of reasonableness, stating that the record does not show conclusively (though admitting that from the record that inference could be drawn, see slip opinion at 6) whether the fire personnel entered the townhouse of the individual who called them first before going into defendant's unit. But the United States Supreme Court has

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[17] 588 F2d at 892.

[18] 588 F2d at 892-893.

repeatedly rejected a "least intrusive means" analysis of Fourth Amendment reasonableness.[19] So also have at least seven federal circuits,[20] including the First Circuit in *Lockhart-Bembery v. Sauro,*[21] holding that to "the extent Lockhart-Bembery argues that Sauro acted unreasonably [under the Fourth Amendment] because there were other, less intrusive ways to reduce the safety hazard, that argument fails as a matter of law. *There is no requirement that officers must select the least intrusive means of fulfilling community caretaking responsibilities.*"[22]

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[19] See *Bd. of Educ. of Independent Sch. Dist. No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822, 837, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 663, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 629 n. 9, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

[20] *See Davenport v. Causey,* 521 F.3d 544, 552 (CA 6, 2008) ("Also irrelevant, despite plaintiffs' argument to the contrary, is whether or not the officer had other means of force at his disposal. The Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances");*Cassidy v. Chertoff,* 471 F.3d 67, 79 (CA 2, 2006) ("The Supreme Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means to accomplish the government's ends"); *Shell v. United States,* 448 F.3d 951, 956 (CA 7, 2006) ("As an initial matter, we note that a search does not need to be the least intrusive alternative to be constitutionally valid, it simply has to be reasonable."); *United States v. Prevo,* 435 F.3d 1343, 1348 (CA 11, 2006) ("Suffice it to say that the Fourth Amendment does not require the least intrusive alternative; it only requires a reasonable alternative."); *Shade v. City of Farmington,* 309 F.3d 1054, 1061 (CA 8,) ("The Fourth Amendment does not require officers to use the least intrusive or less intrusive means to effectuate a search but instead permits a range of objectively reasonable conduct."); *United States v. Melendez-Garcia,* 28 F.3d 1046, 1052 (CA 10, 1994) (stating that the Fourth Amendment does not require police "to use the least intrusive means in the course of a [*Terry*] detention, only reasonable ones").

[21] *Lockhart-Bembery v. Sauro,* 498 F.3d 69 (CA 1, 2007).

[22] 498 F3d at 73 (emphasis supplied).

D. The Exclusionary Rule Should Not Be Applied In Any Event

The United States Supreme Court has only recently said that:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[23]

Not all Fourth Amendment violations result in assessment of damages when a Civil Rights suit is brought, as the doctrine of qualified immunity applies. For example, in the arrest context, "'officers are entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the mistake is objectively reasonable....' Thus, 'the governing standard for a Fourth Amendment unlawful arrest claim is not probable cause in fact but arguable probable cause ...."[24] Here, then, were defendant to sue for a Civil Rights violation for the entry, summary judgment would be granted if the entry was "arguably" reasonable, even if ultimately held not. The exclusion of evidence in such a circumstance—which is designed to deter, not repair, and is thus not a "remedy" for the violation—makes no sense. Even if unreasonable in Fourth Amendment terms, then—and the actions here were *not* unreasonable—it cannot be said that the actions of the fire officials were not *arguably* reasonable, and that exclusion would accomplish any deterrent purpose (or that society would wish to deter prompt action in circumstances such as those in the present case). In the words of *Herring*, *even if* mistaken, the actions of the fire officials here were not "sufficiently culpable that such deterrence [if any here] is worth the price paid by the justice

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[23] *Herring v. United States*, __US__,. 129 S.Ct. 695, 702 (2009).

[24] *Copeland v. Locke,* 613 F.3d 875, 880 (CA 8, 2010).

not *arguably* reasonable, and that exclusion would accomplish any deterrent purpose (or that society would wish to deter prompt action in circumstances such as those in the present case). In the words of *Herring*, *even if* mistaken, the actions of the fire officials here were not "sufficiently culpable that such deterrence [if any here] is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." These officers did not deliberately violate the law, or act recklessly or with gross negligence. Their conduct is not the sort the application of an exclusionary sanction would or should deter.

Relief

WHEREFORE, amicus requests that this Honorable Court reverse the Court of Appeals.

Respectfully submitted,

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